

The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

OLIVIA SELTO, individually, as guardian of minor child K.P. and as Personal Representative of the Estate of KEVIN PETERSON JR, deceased, TAMMI BELL, individually and as Personal Representative of the Estate, and KEVIN PETERSON SR, individually,

**Plaintiffs,**

COUNTY OF CLARK, a political subdivision of the State of Washington; SHERIFF CHUCK ATKINS; Sheriff's Detective ROBERT ANDERSON; Sheriff's Deputy JONATHAN FELLER; and JOHN and JANE DOES 1-10, in their official and personal capacities,

## Defendants.

## I. INTRODUCTION AND SUMMARY OF ARGUMENT

On September 27, 2022, the parties submitted a Joint Status Report. ECF #14. In it the parties represented that the Initial Disclosures would be filed by the deadline in five

Plaintiffs did not.

1 On December 2, 2022, the Defendants conducted a discovery conference with  
 2 Plaintiffs. *Decl. of Cooley*. The purpose of the discovery conference was to seek an  
 3 exchange. The Defendants would permit the late filing of Initial Disclosures and seek no  
 4 sanctions. In exchange, the Plaintiffs would agree to a protective order.

5 The shooting in this case happened October 29, 2020. One of the shooters was  
 6 Deputy Jon Feller. On January 20, 2022, approximately 15 months after the subject  
 7 shooting, Deputy Feller accidentally shot and killed an off-duty Vancouver police officer. *Id.*  
 8 This incident was understandably stressful for Deputy Feller. *Id.* In the Complaint,  
 9 Plaintiffs suggested that they want to litigate this subsequent incident. ECF #1. In the  
 10 discovery conference, Plaintiffs' counsel could not explain how an examination of Deputy  
 11 Feller regarding a shooting 15 months later would be calculated to lead to admissible  
 12 evidence. *Id.* It appears to be a strategy to introduce a completely irrelevant incident, and to  
 13 obtain an upper hand psychologically on a defendant deputy. *Id.*

14 Since filing the Motion, Plaintiffs have served Initial Disclosures. As they were  
 15 simply a cut and paste job, copying the Defendants' Initial Disclosure, the Defendants  
 16 concede this delay is harmless. *Decl. of Cooley*.

17 The present motion utterly ignores the rules and case law applicable to Initial  
 18 Disclosures. The Court should only grant the motion with the sanction that it should enter  
 19 the protective order sought by Defendants.

20 **II. LAW AND ARGUMENT**

21 Rule 37(c)(1) provides that a party failing to provide Initial Disclosures, "is not  
 22 allowed to use that information ... to supply evidence on a motion, at a hearing, or at a trial,  
 23 unless the failure was substantially justified or is harmless." *Hoffman v. Constr. Protective  
 24 Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008), as amended (Sept. 16, 2008).

DEFENDANTS' RESPONSE TO MOTION TO EXTEND  
 TIME - 2  
 3:22-cv-5384 BJR

KEATING, BUCKLIN & McCORMACK, INC., P.S.

ATTORNEYS AT LAW  
 801 SECOND AVENUE, SUITE 1210  
 SEATTLE, WASHINGTON 98104  
 PHONE: (206) 623-8861  
 FAX: (206) 223-9423

1       “Implicit in Rule 37(c)(1) is that the burden is on the party facing sanctions to prove  
 2       harmlessness. ...[I]t is the obligation of the party facing sanctions for belated disclosure to  
 3       show that its failure to comply with [Rule 26] was either justified or harmless....”. *Yeti by*  
 4       *Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001)(cleaned up,  
 5       with citations omitted).

6       “[W]e give particularly wide latitude to the district court's discretion to issue  
 7       sanctions under Rule 37(c)(1).” *Id.* Sanctions do not require a finding of bad faith or  
 8       willfulness, as, “automatic sanction to provide a strong inducement for disclosure of  
 9       material.” *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1180 (9th Cir. 2008),  
 10      as amended (Sept. 16, 2008).

12      Here, the Plaintiffs have admitted to the violation. ECF #20. While the general rule  
 13      of exclusion of evidence is not warranted, the Court still has discretion to award sanctions.  
 14      Here, the sanctions as proposed by Defendants is entry of a Protective Order preventing  
 15      Plaintiffs from examining Defendant Feller about an accidental shooting that happened 15  
 16      months after the instant matter.

18      “The district court enjoys broad discretion when resolving discovery disputes,  
 19      which should be exercised by determining the relevance of discovery requests, assessing  
 20      oppressiveness, and weighing these factors in deciding whether discovery should be  
 21      compelled” *K.C.R. v. Cnty. of Los Angeles*, CV 13-3806 PSG SSX, 2014 WL 3433925, at  
 22      \*2 (C.D. Cal. July 14, 2014).

23      The Court should exercise its discretion and prevent this subsequent accidental  
 24      shooting from being the topic of Deputy Feller's deposition.

1 DATED: December 21, 2022  
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4 KEATING, BUCKLIN & McCORMACK, INC., P.S.  
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6 By: /s/ Andrew Cooley  
7 Andrew Cooley, WSBA #15189  
8 Attorneys for Defendants  
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10 801 Second Avenue, Suite 1210  
11 Seattle, WA 98104  
12 Phone: (206) 623-8861  
13 Fax: (206) 223-9423  
14 Email: acooley@kbmlawyers.com  
15  
16  
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## **CERTIFICATE OF SERVICE**

I hereby certify that on December 21, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

### Attorneys for Plaintiffs

Mark Lindquist, WSBA #25076  
MARK LINDQUIST LAW, PLLC  
505 S. Sheridan Ave.  
Tacoma, WA 98405  
T: 253-861-8611  
Email: [mark@marklindquistlaw.com](mailto:mark@marklindquistlaw.com)

## Attorneys for Plaintiffs

D. Angus Lee, WSBA #36473  
ANGUS LEE LAW FIRM, PLLC  
9105A NE Hwy. 99, Ste. 200  
Vancouver, WA 98665  
Telephone: 360.635.6464  
Email: [angus@angusleelaw.com](mailto:angus@angusleelaw.com)

DATED: December 21, 2022

/s/ *Andrew Cooley*

Andrew Cooley, WSBA #15189  
Attorneys for Defendants  
801 Second Avenue, Suite 1210  
Seattle, WA 98104  
Phone: (206) 623-8861  
Fax: (206) 223-9423  
Email: [acooley@kbmlawyers.com](mailto:acooley@kbmlawyers.com)